Brief for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1902.

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FREDERICK RODGERS,
Appellant,
vs.
THE UNITED STATES.
No. 311.

BRIEF FOR THE APPELLANT.

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FREDERICK RODGERS,
APPELLANT,
v.
THE UNITED STATES.
No. 317.

BRIEF FOR THE APPELLANT.

Statement of the Case.

This is an appeal from the Court of Claims. The claimant, Frederick Rodgers, a rear-admiral of the line of the navy, brought suit to recover the sum of $3,346.60, which he claimed as the balance due him on account of his pay and allowances for the period between March 3, 1899, and March 2, 1901. The claim is founded upon the law of Congress, known as the "Navy Personnel Act," which was approved on March 3, 1899, and entitled: "An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States" (30 *Stat. L., p.* 1004). The applicable portions of this act are contained in Sections 7 and 13, and are as follows:

"SEC. 7. That the active list of the line of the Navy, as constituted by section one of this Act, shall be composed of eighteen rear-admirals, seventy captains, one hundred and twelve commanders, one hundred and seventy lieutenant commanders, three hundred lieutenants, and not more than a total of three hundred and fifty lieutenants (junior grade) and ensigns: *Provided*, That each rear-admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowance as are now allowed a brigadier-general in the Army. * * *"

"SEC. 13. That, after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the Navy * * * shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army: *Provided*, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty. * * *"

The findings (*pp.* 4–5) show that the claimant was appointed and commissioned a rear-admiral, on March 3, 1899. From the date of his appointment until March 2, 1901, he was one of the rear-admirals, "embraced in the lower nine numbers of that grade." Throughout the period in question he performed such duties of his grade as were assigned to him, serving on shore from March 3, 1899, until February 13, 1901, and for the rest of the time at sea (*Finding II, p.* 4). While on shore he received pay at the rate of $4,675 a year, or the pay of a brigadier-general (*R. S. U. S., Sec.* 1261) less fifteen per centum, and received commutation in lieu of the allowances of a brigadier-general, except that for forage (*Findings III, IV, and V, p.* 5). While at sea he received pay at the rate of $5,500 a year which is the pay provided by law for a brigadier-general (*Finding VI, p.* 5).

In paying the claimant, the disbursing officers of the navy were governed by a decision of the Comptroller of the Treasury, rendered on April 29, 1899 (*Finding VII, p.* 5).

It will be found convenient to divide the claim into three items, one relating to each of the following periods: March 3 to June 30, 1899; July 1, 1899, to February 13, 1901, and February 14 to March 2, 1901.

The case will then resolve itself into these propositions:

I. Between March 3 and June 30, 1899, the claimant was entitled to receive the pay and allowances of a brigadier-general, without any deduction.

II. Between July 1, 1899, and February 13, 1901, he was entitled to pay at the rate of $6,375 per annum, being the pay of a major-general (*R. S. U. S., Sec.* 1261), less fifteen per centum, and was entitled to the allowances of a major-general, except that for forage.

III. From February 14 to March 2, 1901, he was entitled to the pay and allowances of a major-general, without deduction.

The difference between the claimant's pay and allowances for the whole period covered by the claim, at the rates claimed, and the amount actually received by him during that time amounts to $3,346.60 (*Finding VII, p.* 5).

By its judgment the Court of Claims dismissed the petition (*p.* 11).

Specifications of Error.

The errors of the Court of Claims, assigned by the appellant and intended to be urged, are these:

1. The said court erred in ruling that the claimant was not entitled to the pay and allowances of a brigadier-

general, without any deduction, for the period from March 3 to June 30, 1899.

2. The said court erred in ruling that the claimant was not entitled to the pay of a major-general, less fifteen per centum, and the allowances of a major-general, except forage, for the period from July 1, 1899, to February 13, 1901.

3. The said court erred in ruling that the claimant was not entitled to the pay and allowances of a major-general for the period from February 14 to March 2, 1901.

4. The said court erred in dismissing the petition.

Argument.

The questions of law raised by this appeal depend for their determination upon the interpretation of the parts of sections 7 and 13 of the "Navy Personnel Act," which have been quoted. With the view of getting a better understanding of these sections, it is proper and desirable to consider the act as a whole, the circumstances attending its passage, and the general intent of Congress with respect to the reorganization of the navy (*Platt* v. *Railway*, 99 *U. S.* 48; *U. S.* v. *Freeman*, 3 *Howd.* 556, 565).

Prior to the passage of "Navy Personnel Act," officers of the navy, though entrusted with the performance of duties, quite as arduous and important as those of army officers of corresponding rank, were given much less pay than the latter. This had occasioned discontent throughout the navy, and Congress, appreciating the injustice of it, proceeded to remedy the difficulty by making the pay of officers of corresponding rank in the army and navy substantially the same (*Sec.* 13, *supra*).

To meet the necessities of our increased naval establishment, the number of officers in each grade was increased.

Of officers of flag rank there had been two distinct grades—rear-admirals and commodores. There had been six of the former and ten of the latter. The rear-admirals corresponded in rank with major-generals; the commodores with brigadier-generals (*R. S. U. S., Sec.* 1446). The grade of commodore did not exist in the navies of other nations and had been found to be disadvantageous. It was abolished. Provision was made for but one regular grade of flag officers, namely, that of rear-admiral, and the number in that grade was increased to eighteen (*Sec.* 7, *supra*). Every rear-admiral, commissioned on March 3, 1899, forthwith became the equal in rank of each other officer in the grade, except in point of seniority, and hence became subject to all of the obligations of, and liable to be assigned to any duty appropriate for, a rear-admiral. There was no division of the grade into senior and junior rear-admirals, as in the case of lieutenants, where lieutenants and "lieutenants (junior grade)" form two wholly distinct grades.

The general rule, which has always been observed in the navy and in the army as well, with respect to the compensation of officers, is that pay and allowances should be increased proportionately with advancement in rank. This was not done, merely because the services of officers become more valuable, as they grow older in the service but also because each advancement casts upon an officer increased obligations and renders it more expensive for him to maintain himself in a manner conformable to his position. The action of Congress in equalizing the compensation of officers of the army and navy, of corresponding rank, was in accordance with this rule. The abolition of the grade of commodore left the navy with no officers corresponding in rank with brigadier-generals, and, therefore, none whose pay should be

equal to that of brigadier-generals, if Congress has consistently followed the prevailing rule and the general intent of the "Navy Personnel Act."

According to the decision of the court below the act makes an exception, in the case of one-half of the rear-admirals, to whom it gives rank corresponding with that of major-general; but whom it places on a par with a lower grade, for purposes of compensation. Let us see whether such an exception is justified by anything contained in the act.

I.

Between March 3, and June 30, 1899, the claimant was entitled to receive the pay and allowances of a brigadier-general, without any deduction.

Section 7 of the "Navy Personnel Act" (*supra*) became operative on the date of its approval (March 3, 1899). Forthwith, it created twelve vacancies in the grade of rear-admiral and forthwith abolished the office of commodore. The ten officers, including the claimant, who had filled the numbers of the grade of commodore, and the two officers, standing at the head of the list of captains, were appointed and commissioned as rear-admirals. Of the twelve, those occupying the highest three numbers were allowed, during the period between March 3, and July 1, 1899, the compensation provided for rear-admirals by section 1556, R. S. U. S., namely:

> "* * * When at sea, six thousand dollars; on shore duty, five thousand dollars; on leave, or waiting orders, four thousand dollars."

With the one exception, Section 1556 R. S. U. S., and other provisions of law, with respect to the pay

and allowances of officers in the line of the navy, remained in force until July 1, 1899. They were not, until then, affected by the general repealing clause (*Sec.* 26) of the "Navy Personnel Act," because the body and first proviso of Section 13 of that act (*supra*) providing for the equalization of the pay of officers of the army and navy, did not become operative until "after June thirtieth, eighteen hundred and ninety-nine." The exception referred to was that with respect to the compensation of the remaining nine of the newly commissioned rear-admirals, among whom the claimant was included and who occupied the nine lower numbers of their grade. This was provided for by the first proviso of Section 7 of the "Navy Personnel Act" (*supra*) which took effect on the date of its passage, (*Matthews* v. *Zane*, 7 *Wheat.* 164; *Gardner* v. *Barney*, 6 *Wall.* 499.) The decisions of the Comptroller and the Court of Claims agree that Section 7 took effect on the date of its passage, and then operated as a repeal of earlier statutes, relating to the pay of the rear-admirals, occupying the lower nine numbers of the grade (*p.* 10, *also* 5 *Dec. Comp.* 750, 752). But both of them held that by reason of "long established policy," Section 7 could not be regarded as complete, and must be considered as limited and controlled by the first proviso of section 13, which for purposes of such control possessed some form of vitality before July 1, 1899, when it became operative, and in its pre-natal condition attached itself to section 7, causing it to provide that each rear-admiral of the nine lower numbers when on shore should receive fifteen per centum less than the pay of a brigadier-general. This ruling is in conflict with the letter of the statute:

> "*Provided*, That each rear-admirial embraced in the nine lower numbers of that grade shall receive the same pay and allowance as are now allowed a brigadier-general in the army."

It is in conflict, likewise, with other decisions of the comptroller and of the court below. The former held (5 *Dec. Comp.*, 713, 714 *and Id.* 966, 967,) that the proviso of section 13, "*did not become operative until after June* 30, 1899, *when the section of which it forms a part goes into effect. It does not constitute a part of the 'existing law,' according to which an officer shall receive pay.*" The Court of Claims in its opinion in the present case said (p. 9):

> "Section 13 is in general terms, and the language there used does not indicate that it was the intention of the Congress to abrogate the special provision made in section 7 for the rear-admirals 'embraced in the nine lower numbers of that grade,' and special provision having been made for them *it cannot be held that a subsequent general statute, much less in the same act, was intended to alter or repeal the special provision so made.* (*Endlich on the Interpretation of Statues*, 223, *et seq.*)"

In the case of *Royce* v. *U. S.* (*Decided, April* 29, 1901), which was a suit founded upon another clause of section 13, the Court of Claims held that this section could have no retroactive effect and could not be considered for the purpose of computing the pay of officers before July 1, 1899.

This court has adopted and always followed the rule that the language of a statute cannot be disregarded in favor of any supposed policy of Congress, such as that of giving officers on shore duty less pay than when at sea.

Mr. Justice Story, delivering the opinion of the court

in the case of *United States* v. *Dickson* (15 *Pet.* 141, 146), said :

> " * * * The general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that when the enacting clause is general in its language and objects and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms."
>
> See also : *St. Paul, etc., Ry.* v. *Phelps* (137 *U. S.* 528).

The language of section 7 was clear and complete. It made no exception, with respect to the pay of rear-admirals, when on shore duty. It allowed the officers concerned all of the allowances of a brigadier-general, including forage. Clearly it was not competent for executive officers of the Government to interpolate the embryonic provisions of section 13 into section 7, for the purpose of engrafting an exception upon the latter. In the case of *Yturbide* v. *U. S.* (22 *Howd.* 290) it was said :

> "If there be no saving in a statute the court cannot add one on equitable grounds."

We submit that from March 3, 1899, as long as the first proviso of section 7 remained unrepealed, the claimant was entitled to pay, at the rate of $5,500 a year, and to all of the allowances which a brigadier-general was entitled to receive on March 3, 1899.

II.

Between July 1, 1899, *and February* 13, 1901, *the claimant was entitled to the allowances of a major-general,*

except forage, and the pay of a major-general, less fifteen per centum.

Section 13 of the "Navy Personnel Act" provides:

> "That after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of the line of the navy and of the medical and pay corps shall receive the same pay and allowances as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army: *Provided*, That such officers when on shore shall receive the allowances, but fifteen per centum less pay than when on sea duty. * * *"

It cannot be denied that if this stood alone, there could be no doubt of the claimant's right to receive compensation as claimed for the period in question He was a rear-admiral, corresponding in rank with a major-general. We contend that on July 1, 1899, when section 13 took effect, and for the first time "constituted part of the 'existing law' according to which an officer should receive pay," it repealed the first proviso of section 7. Hence that on and after July 1, 1899, it did stand alone, so far as the compensation of this claimant was concerned.

It is true that repeals by implication are not favored and that a later provision of a statute will not be regarded as superseding an earlier one without urgent reasons, but we believe that there is ample ground for our contention, and that it is the only one consistent with the language employed and the intent of Congress.

The rule of construction laid down by this court in several decisions is applicable to the precise question before us. In the case of *King* v. *Cornell* (106 *U. S.* 395, 396), this was said:

> "While repeals by implication are not favored, it

> is well settled that where two acts are not in all respects repugnant, if the latter act covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal. This subject was fully considered in *United States* v. *Tynen*, 11 Wall. 88, where the early authorities are cited and reviewed at considerable length."

The decision in the case of *Red Rock* v. *Henry* (106 *U. S.* 596, 601) is to the same effect.

In the case of *District of Columbia* v. *Hutton* (143 *U. S.* 18, 26–27), it was held:

> "We are not unmindful of the rule that repeals by implication are not favored. But there is another rule of construction equally sound and well settled which we think applies to this case. Stated in the language of this court in *United States* v. *Tynen*, 11 Wall. 88, 92, it is this: 'When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the later act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' See also *Murdock* v. *Memphis*, 20 Wall. 590, 617; *Tracy* v. *Tuffly*, 134 U. S. 206, 223; *Fisk* v. *Honario*, 142 U. S. 459."

Section 13 covers "the whole subject" dealt with by section 7, for in terms it embraces all commissioned officers of the line of the navy. If section 7 were allowed to stand after section 13 took effect, it would constitute in two respects, a marked exception to the uniform rule which Congress endeavored to establish.

In the first place it would result in the singling out of a little group of nine officers, from the entire list of the navy, and cause them to correspond in rank and obligations with one grade in the army, but as to compensation, to correspond with a lower grade.

In the second place, it would fix, permanently, the compensation of this group of officers, giving them the pay and allowances which were allowed certain officers of the army on March 3, 1899. If the pay of such army officers should, subsequently, be increased or reduced, the change would not affect the naval officers, for the first proviso of section 7 is as follows:

> "* * * Each rear-admiral, embraced in the nine lower numbers of that grade shall receive the same pay and allowances *as are* NOW *allowed* a brigadier-general in the army."

Whereas it was intended by section 13 not only to place officers of the navy on a plane of substantial equality with army officers, but to maintain that condition of things. In other words, if the compensation of army officers of any grade should be changed the compensation of naval officers of the corresponding rank would be increased or decreased to an equal extent, for it is provided (*Sec.* 13) that all naval officers of the line and medical and pay corps:

> " * * * shall receive the same pay and allowances *as are or* MAY BE *provided by or in pursuance of law* for the officers of corresponding rank in the army."

These radical differences between the two sections of the act, show that the proviso of section 7 was not intended to be permanent, but merely to provide for the

period of about four months which would intervene between the passage of the act and the date, when section 13 should become operative.

The court below said (*p.* 10) that it could not "attribute to the Congress the folly of having in the same act provided two rates of pay for the same officers, one a temporary rate, for four months at $5,500, and thereafter a permanent rate, at $7,500." We submit that it was not for the Court of Claims to say whether Congress had acted wisely or not. Moreover the provision of two rates of pay for the officers in question, cannot be pronounced foolish. All of them, except two, had been commodores, which grade was abolished on March 3, 1899 (*Secs.* 7 *and* 26, *supra*), and all provisions of law with respect to it, including the one which fixed the pay of commodores, were repealed. For four months after the passage of the act, or until the end of the current fiscal year, all other officers were to be paid in accordance with the navy pay table (*Sec.* 1556, *R. S. U. S*). Some provision had to be made for the pay of the nine officers. It would have been fair to provide that they should receive the pay formerly allowed commodores until "after June thirtieth." For some reason Congress did not do this. To allow them at once the navy pay of rear-admirals would have been a discrimination in their favor, giving them an advance both in rank and pay, four months before all other officers. Therefore, Congress did a reasonable thing in providing that for this short period they be allowed the same compensation as officers of the army, with whom they had corresponded in rank, when commodores.

III.

From February 14 *to March* 2, 1901, *the claimant was entitled to the same pay as a major-general and the allowances of a major-general, except forage.*

This proposition raises precisely the same questions of law, as those considered under the preceding division of this brief, the only difference being that during this period the claimant was employed on sea duty and accordingly was entitled to the pay of a major-general, without deduction.

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